THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0037, Julio Sanchez v. Daher Auto Trade, Inc. & a., the court on June 8, 2006, issued the following order:

The defendants, Daher Auto Trade, Inc., Route 102 Land Holding LLC, and Carlos Daher, appeal an order of the trial court awarding $160,350 to the plaintiff, Julio Sanchez. They argue that the superior court erred in finding that: (1) the plaintiff could void an asset purchase and sale agreement (agreement); (2) he could not have waived a specific provision of the agreement; and (3) it could not consider certain parol evidence. We affirm.

Because the interpretation of a contract is ultimately a question of law, we review the trial court's interpretation of a contract de novo. Lawyers Title Ins. Corp. v. Groff, 148 N.H. 333, 336 (2002). When interpreting a written agreement, we give the language used its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Id. at 336-37. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract. Id. at 337.

In this case, the agreement provided that defendant Daher Auto Trade Inc. would sell to the plaintiff the assets listed in Exhibit A of the agreement. Exhibit A provided in relevant part: "Any and all inventory, furniture, furnishings and equipment, used or useful in connection with an [sic] motor vehicle repair facility, located at premises known as 7 Nashua Road, Londonderry, New Hampshire. The parties agree to affix a more specific list of inventory, furniture, furnishings and equipment with [sic] ____ days of the execution of this bill of sale." The agreement also provided that the parties would agree within thirty days of the closing to an allocation of the purchase price among: (1) equipment and furnishings; (2) inventory; and (3) goodwill. The agreement also provided that the seller would provide at the closing a bill of sale warranting that title to the assets was good and marketable and that if the seller failed to convey the assets in the form and manner prescribed, the buyer would be entitled to terminate this agreement as his sole remedy.

There is no dispute that the list of assets was not provided. Rather, the defendants argue that the list was not a material term of the transaction. Among the circumstances that are significant in determining whether a failure to perform under a contract is material is the extent to which the injured party will be deprived of the benefit which he reasonably expected. Restatement (Second) of Contracts § 241 (1981). In this case, the evidence established that the plaintiff needed the list not only to determine what he had actually purchased free and clear of the alleged ownership rights asserted by others but also to allocate the purchase price among the equipment, furnishings, inventory and goodwill.

The defendants also argue that the trial court erred in excluding certain parol evidence. While it is true that the trial court found no ambiguity in the parties' agreement and thus concluded there was no need to consider parol evidence in construing its provisions, it is also true that the court considered the evidence to determine whether the plaintiff had waived certain provisions. We find no error in this treatment of the evidence.

Nor are we persuaded by the defendants' argument that the plaintiff waived the provision requiring the list of assets "orally or by his conduct." The agreement provided that it contained "the entire agreement of the parties with respect to the sale of the Assets of the Business, and supersedes all previous agreements, verbal or written. There are no other agreements, representations, or warranties among the parties that are not contained in this Agreement." While the defendants correctly note that parties to a contract may orally modify a contract despite an express provision of the contract to the contrary, see, e.g., Prime Financial Group v. Masters, 141 N.H. 33, 37 (1996), whether they have intended to waive such a provision is a question of fact. See id. In this case, the trial court found that the plaintiff had not done so. Because the evidence amply supports this finding, we affirm. See Greenhalgh v. Presstek, 152 N.H. 695, 700 (2005).

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk